VIRGINIA LAW REGISTER.

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Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at University Station, Charlottesville, Va.; BUSINESS communications to the PUBLISHERS.

OUR department of "Notes of Cases" has been unavoidably crowded out of this number.

THE Virginia law schools have opened with encouraging prospects. We have no specific information as to Richmond College, save that its opening has been most auspicious. The attendance at Washington & Lee is considerably larger than last year, and at the University of Virginia the matriculation is the largest in the history of the Law School—the number of matriculates to date being one hundred and sixty-four, against one hundred and thirty-eight last session.

THE decision of Virginia Supreme Court of Appeals, in *Perkins* v. *Siegfried* (September 21, 1899), at first glance seems to afford an easy method of evading the principle that a church cannot take as a legatee under a will in this State. In that case the testatrix acknowledged in her will that she owed a particular church six hundred dollars, and directed that it be paid by her executor. There was no other proof offered of the indebtedness; and while the executor in his answer denied that there was any indebtedness in fact, so far as appears from the opinion, no proof on the subject was taken on either side. The court holds (Harrison, J., delivering the opinion, and Keith, P., dissenting) that the debt may be enforced.

On the facts in the record, we agree with the majority, though the record does suggest that a pious (and, therefore, commendable) fraud has been perpetrated on the statute. The admission by the testatrix that she owed the debt was certainly *prima facie* proof of its existence, and cast the burden on the executor to disprove it. If he failed in this there was nothing to do but to enforce it. The court indicates its belief that the debt in question was a subscription pre-

viously made to the church by the testatrix, and holds it enforceable.

But we do not understand the court to decide that where a testator acknowledges an indebtedness to a church it will be enforced in the face of satisfactory proof of the non-existence of the debt. As a voluntary agreement *inter vivos* to pay money cannot be enforced against the promisor, when living, or his estate when dead, unless under seal (Va. Code, sec. 2660, sub-sec. 6), so it could not be enforced though evidenced in a testamentary paper. This suggests that legacies to churches may be made copper-fastened by designating the legacy as a debt, and executing the will under seal.

In the same opinion it is held that a voluntary, unincorporated, society, consisting of a la ge number of members, may enforce any right that it may have by means of a suit in equity, instituted by one or more of its members suing on behalf of the rest. In this ruling the court followed *Coffman* v. *Sangston*, 21 Gratt. 263, where it was held, Staples, J., delivering the opinion, that a purely legal right might be enforced in a court of equity by one or more members of a voluntary society, suing on behalf of the rest; the jurisdiction in equity attaching on the ground of inconvenience of the remedy at law by reason of the multitude of plaintiffs necessary at law.

In *Phillips* v. *University of Virginia*, in an opinion just handed down by the Supreme Court of Appeals of Virginia, through Riely, J., it is held that, as the University of Virginia is strictly a public corporation, owned by the State and subject to the control of the legislature, its property cannot be subjected to a mechanic's lien.

There seems to be no escape from this conclusion. The corporation whose legal designation is "The Rector and Visitors of the University of Virginia," bears the same relation to the State as other public agencies. The property of all purely public agencies, such as cities, counties, public school boards, hospitals, etc., and held for public purposes, really belongs to the State, although for convenience of operation and control the legal title and the immediate management may be vested in a distinct corporation.

The Board of Visitors of the University clearly have no power, in the absence of legislative sanction, to sell any part of the University domain. No one can doubt that a deed from the Board of Visitors, in which they should attempt to sell the famous Rotunda of the University, would be absolutely void. What they cannot do directly, certainly they cannot accomplish indirectly. If, as the result of their

contract with a builder or material man, a lien may be fixed upon the Rotunda, as was attempted in this case—and a valid lien implies a valid sale to enforce it—we should have the anomaly of a valid exercise of a power by indirection, where the direct exercise of the same power would be invalid. In the absence of the plainest legislative authority to that effect, the court would not sanction any act of the Board of Visitors which might result in the transfer, for example, of the ownership of the Rotunda to private persons, or the sale of the splendid lawn to be transformed into a pasture for cattle or a garden for cabbages. And yet the principle contended for in this case leads to that possible result.

It is due the Board of Visitors and the University to say that the work for which this claim was made, was promptly paid for in full to the general contractor. The latter, however, failed to pay the sub-contractor, who endeavored to indemnify himself by filing a mechanic's lien on the college property.

THE opinion of Cardwell, J., in *Roanoke* v. *Shull*, published in full in this number, lays down with clearness and accuracy the duties and liabilities of municipal corporations in connection with the maintenance of streets and bridges. The doctrine laid down by the court that the city cannot escape liability by proof that its corporate limits were so extensive that it is unable to look after all of its streets properly, is clearly right. By the assumption of this exclusive duty by the corporation, the county or private persons are excluded from the right to make necessary repairs in the streets, and the corporation clearly cannot rid itself of this public duty without legislative assent. The other points decided, that an infant under fourteen is *prima facie* incapable of contributory negligence, and that negligence of the parent or guardian is not imputable to the infant, when the latter is plaintiff in the action, have already been settled in Virginia.

The case of *Armistead* v. *Hartt*, also reported in full, construes a limitation in a will "to my four children, share and share alike, and *in the event of the death* of one or more of my children, his, her or their share shall go to those of my children living," as referring to the death of any child *before the testator*. As far as we know, this precise limitation has not before been passed upon by our Court of Appeals. The ruling is manifestly right, both from the standpoint of common sense and authority.

In the same case, it is held that the beneficiaries of a trust may

call in the legal title and put an end to the trust, when they are all *sui juris*, and there is nothing in the language of the trust instrument, or in the character of the trust, to require its continuance. This is laid down by Professor Bispham as one of the chief characteristics of a private trust. In contrasting public with private trusts, he says that the latter "are those wherein the beneficial interest is vested absolutely in one or more individuals, who are, or within a certain time may be, definitely ascertained, and who are, therefore, collectively, unless under some legal disability, competent to control, modify or determine the trust." Bisp. Eq., sec. 59. The same principle was announced (without citation of authority) in *Thom* v. *Thom*, 95 Va. 413, reported, with an excellent note by M. P. Burks, in 3 Va. Law Reg. 728.

A RECENT number of the *Central Law Journal* (Vol. 49, p. 45) contains an interesting discussion by Mr. Archibald R. Watson (B. L. Univ. of Va., 1895) of the question whether a plea of payment is new matter, and must therefore be specially pleaded, under the Code system of pleading, requiring "new matter" in defense to be so pleaded. Mr. Watson's article has an interest for the common law pleader as well, since he traces the question from its common law source. The conclusion reached is, that much of the confusion existing on this subject is due to the failure of the courts to distinguish between payment *before* breach and payment *after* breach. In an action to recover a debt, the failure of the defendant to pay at or before maturity is an essential part of the plaintiff's cause of action. He must allege and prove the defendant's default in this particular. Hence, payment at or before maturity is, correctly speaking, not a defense at all—the burden is on the plaintiff to prove that the defendant did not pay at maturity, and not on the defendant to prove that he did so pay. It follows that payment *at maturity* is not "new matter" any more than is "not guilty" in an action of trespass. As in the latter case the plaintiff must allege and prove the guilt of the defendant, so in the other he must allege and prove his default by non-payment of the debt on the day it was due. But the plaintiff having established this default, need go no further in his allegations or proof. He is not called upon to prove that the defendant has not subsequently made good his default. The plaintiff has made out a *prima facie* case by establishing a breach of the contract at maturity. If the defendant proposes to set up the defense that, notwithstanding his default, he has subse-

quently made it good by payment, he must establish it affirmatively, and hence such a defense is in confession and avoidance, and is new matter. Consequently, in those States where all defenses by way of confession and avoidance, or all defenses setting up new matter, are required to be specially pleaded, the defense of payment *after maturity* must be specially pleaded.

Under the common law system of pleading, the general issues of *nil debet* and *non assumpsit* are broad enough to include nearly all defenses that might be set up, whether consisting of new matter or not, including payment after maturity. So that while the point is full of historical interest, it has less of practical interest for the common law pleader than for the pleader under the Code system.

But the point seems to be of vital importance in Virginia, in view of our statute which provides that "in a suit for any debt the *defendant* may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." Va. Code, sec. 3298. In *Richmond etc. R. Co.* v. *Johnson*, 90 Va. 775, it was held that in the absence of a special plea, or of an account filed as required by the statute, no proof of payment could be received. It does not appear whether the payment attempted to be set up was made *at* or *after* maturity. But it is clear that this statute was not intended to alter the common law rule that a plea of *nil debet* or *non assumpsit* puts the plaintiff on proof of his whole case—including proof of non-payment at maturity. The provision is that the "defendant" shall not prove payment unless specially pleaded—that is, that where it is *incumbent on him* to establish payment—and not that the plaintiff is in any manner relieved of the burden of making out his whole case as at common law. In other words, under the general issue of *nil debet* or of *non assumpsit*, the defendant may dispute the truth of any of the material allegations of the declaration, including the allegation of non-payment at maturity. He does not thereby set up payment as an affirmative defense, but merely denies the breach of contract upon which the plaintiff's action is based. Hence, notwithstanding the statute requiring a special plea where the defendant sets up payment, payment *at maturity* may still be shown under the general issue of *nil debet* or *non assumpsit*.

THE opinion of Judge Sanborn, in *Whalen* v. *Gordon*, 95 Fed. 305, contains a learned discussion of the subject of amendment of

pleadings as affecting the defendant's rights under the statute of limitations. The original petition was for the recovery of damages for alleged breach of warranty of quality in the sale of a breeding stallion. Subsequently plaintiffs filed an amended petition seeking to rescind the contract and recover the purchase price. To this amended petition defendant interposed the plea of the statute of limitations. Reckoning from the date of the purchase to the date of the institution of the original proceeding, the action was not barred; but if the period were reckoned up to the filing of the amended petition, the result would be otherwise. The court was, therefore, called upon to decide to which of these periods the institution of the action was to be ascribed.

The court laid down the following sound principle as deducible from the authorities: "An amendment to a petition which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, not before introduced or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed. *Railway Co.* v. *Wyler*, 158 U. S. 285, 289, 298; *Railway Co.* v. *Cox*, 145 U. S. 593, 601, 606; *Sicard* v. *Davis*, 6 Pet. 124; *Van de Haar* v. *Van Domseler*, 56 Iowa, 671, 676 (10 N. W. 227); *Jacobs* v. *Insurance Co.*, 86 Iowa, 145 (53 N. W. 101); *Buel* v. *Transfer Co.*, 45 Mo. 563; *Scovill* v. *Glasner*, 79 Mo., 449, 453; *Crofford* v. *Cothran*, 2 Sneed, 492; *Railroad Co.* v. *Jones*, 149 Ill. 361 (37 N. E. 247); *Eylenfeldt* v. *Steel Co.*, 165 Ill. 185 (46 N. E. 266); *Railroad Co.* v. *Campbell*, 170 Ill. 163, 167 (49 N. E. 314); *Christy* v. *Farlin*, 49 Mich. 319 (13 N. W. 607); *Flatley* v. *Railroad Co.*, 9 Heisk. 230, 237; *Buntin* v. *Railway Co.*, 41 Fed. 744, 749; *Newton* v. *Allis*, 12 Wis. 378; *Railroad Co.* v. *Smith*, 81 Ala. 229 (1 South. 723)."

The question as to when an amendment will be regarded as a continuation of the original suit by relation back to its institution, and when not, has been before the Supreme Court of Virginia in several cases, and decided on similar principles.

In *Stout* v. *Vause*, 1 Rob. (Va.) 169, a suit was brought by a surety

who had paid nothing, against his co-securities, for contribution. A demurrer to the bill was sustained on the ground that he could not maintain the suit. The bill was then amended by inserting as co-plaintiff the name of a surety who had paid. But in the meanwhile the land of a non-resident defendant (against whom proceedings in the nature of an attachment had been taken) was sold to a *bona fide* purchaser without notice of the suit. It was held that since the amendment made an entirely new case, the suit should be regarded as having been instituted at the time the amended bill was filed. Here, it will be observed, the only plaintiff who was entitled to maintain the suit, was not a party originally, and hence the suit was not instituted *as to him* until the amended bill was filed.

In *Morrison* v. *Householder*, 79 Va. 627, the converse is illustrated. There was a misjoinder of plaintiffs and a non-joinder of defendants. The bill was amended by dropping some of the plaintiffs and adding new defendants. In the meanwhile the claim became barred by the statute of limitations, if the time was to be reckoned up to the filing of the amended bill. It was held, however, that the amended bill was but a continuation of the original suit, and the time was to be reckoned only to the institution of the original suit.

The case of *Carnegie* v. *Hulbert*, 70 Fed. 209 (16 C. C. A. 498), affords another excellent illustration of the same principle. The bill failed to make the necessary jurisdictional averments, and on appeal the case was reversed for that cause. The proper averments were then added by way of amendment. In the meanwhile the statutory period of limitation had elapsed, and was pleaded to the amended bill, thus raising the question whether the amendment should have relation back or not. The court, per Caldwell, Circuit Judge, said:

"It is not claimed that the amendment to the petition introduced any new or different cause of action, but the contention of defendant's counsel is that in contemplation of law the commencement of the suit dates from the time the petition was amended so as to show the circuit court had jurisdiction. The contention is not sound, as we have heretofore held. In *Bowden* v. *Bonham*, 59 Fed. Rep. 752 (8 C. C. A. 248), in answer to a similar contention, we held: 'But the court very properly granted the plaintiffs leave to amend their complaint, and it was amended. Nevertheless, the plaintiff in error asserts that as the complaint, at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the case prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is every-day practice to allow amendments of the character of those made in this case, and when they are made, they have relation to the date of the filing of the

complaints, or to the issuing of the writ or process amended. When a complaint is amended it stands as though it originally read as amended. The court, in fact, had jurisdiction of the cause from the beginning, but the complaints did not contain the necessary averment to show it; in other words, the amended complaint did not create or confer the jurisdiction, it only brought on the record a proper averment of a fact, showing its existence from the commencement of the suit."

In an extensive note to the case last cited, in 16 C. C. A. at p. 508, are collected all the Federal cases on the subject, showing that the rule is well established that amendments which do not make a new case, but merely make the original case conform in its averments to the requirements of law, relate back to the institution of the suit.

IN *Barnes* v. *Morrison*, published in full elsewhere in this number, the main question discussed is the legal effect of an arrangement between two persons that one shall refrain from bidding at a public sale, and the other shall admit him to an interest in the property in case it is knocked out to him. The question is one of much practical importance. In view of the multitude of sales of this character annually made under orders of court and deeds of trust, it is remarkable how rarely the question has arisen in Virginia.

The principle enunciated by the court, that the legality of such an arrangement depends upon the motives of the parties, is clearly sound. The difficulty is not so much in the legal principle involved as in its practical application—the really difficult question being to ascertain the inducing motive. Each case must, therefore, stand on its own bottom.

The opinion in the case of *Roundabout* v. *Miller*, 32 Gratt. 454, relied upon, while citing no authority to sustain its conclusions, doubtless states the law correctly. The strong point in that case was that none of the bidders who entered into the joint arrangement desired to purchase the entire property, which consisted of several tracts offered as a whole, but each desired a particular portion only. The combination, therefore, encouraged rather than depressed the bidding. Without the combination, none of the parties would have become bidders at all. The court comments on this circumstance, saying: "We can conceive of no good reason when a tract of land is offered for sale why parties who *bona fide* wish to purchase different parts of the same, and neither of whom wish(es) to purchase the whole, may not agree to unite in the purchase of the whole, and then divide it between themselves."

This distinguishing feature appears in the later case, though in

not so strong a form. Barnes, the defendant, appears to have desired to purchase the whole lot of whiskey offered; he had actually bid for the whole, when the plaintiff appeared upon the scene. The plaintiff was likewise prepared to bid for the whole, as distinctly appears from the opinion. But it also appears that the plaintiff's purpose in attending the sale was to purchase only certain barrels of the lot offered, upon which barrels he already had some sort of claim. Finding the entire lot being offered as a whole, he then proposed a joint purchase in order to accomplish his original purpose as nearly as possible. This purpose afforded a laudable motive for the joint arrangement, so far as the plaintiff was concerned.

As the court says, it is perfectly legitimate for bidders to combine for a proper purpose. If, for example, each desires only a portion of the subject of sale, or more capital is required to make the purchase than any one bidder desires to invest, or if the subject be of such a character that its operation by a single person without associates is impracticable or undesirable, or if, in any case, the combination is entered into *to accommodate the peculiar circumstances of the parties*—then, although such combination may indirectly prevent competition, its tendency is in fact toward accomplishing a sale at a fair value, where otherwise there would be no sale or one made at a sacrifice. Such an arrangement will generally induce those to bid who otherwise would not; and it at least affords a proper motive for entering into the arrangement, thus distinguishing it from an unlawful combination. As said by Mr. Justice Nelson, in *Kearney* v. *Taylor*, 15 How. 519, cited in the opinion: "It is true that in every association formed to bid at the sale, and who appoint one of their number to bid in behalf of the company, there is an agreement express or implied that no other member will participate in the bidding, and hence in one sense it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to bid on his own account, the competition would be as strong and as efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all." The learned justice then proceeds to give illustrations of lawful combinations, some of which illustrations we have used above.

The real test in such cases seems to be, whether the combination was entered into *bona fide*, to carry out some particular and lawful end desired by the participants, or to accommodate the peculiar circumstances, financial or otherwise, of the parties. If so, even though

the effect may have been to depress the bidding, the motive being a lawful one, the transaction will be sanctioned as lawful. But where it appears that there was a combination among bidders, and nothing is offered in explanation or extenuation, save their own testimony that they did not make it for an unlawful purpose, it is a conclusion of law that the combination is unlawful. The "intent" in such case is the legal intent, to be ascertained from the action of the parties. Where a seller makes fraudulent representations which deceive a purchaser, he cannot remove the legal conclusion of fraud, by swearing that he meant no harm and that his motive was good. Where a general deed of assignment contains reservations and conditions which render it voidable on its face as a fraud upon creditors, this legal conclusion cannot be overthrown by the testimony of the grantor that his intentions were not unlawful. So, we apprehend, in case of a combination among bidders—if there be no specific motive shown to induce the combination, other than becoming purchasers of the property at as low a price as possible, then its illegality follows as a conclusion of law.

The authorities on this subject are collected in the editor's note to *Thomas* v. *Kerr*, 96 Am. Dec. 264, 268–270.